

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
In the Matter of:)	
)	
Cancellation of Award Prior to)	WRITTEN DETERMINATION
Performance)	
)	
Materials Management Office)	
IFB No. 5400002037)	POSTING DATE: October 19, 2010
Statewide Term Contract for)	
<u>Toilet Paper and Paper Towels</u>)	MAILING DATE: October 19, 2010

This matter is before the Chief Procurement Officer (CPO) based on the attached letter dated October 14, 2010, in which the Materials Management Office (MMO) asks the CPO to cancel all awards that it issued for the above-referenced invitation for bids (IFB) due to administrative errors that occurred in the award process. Under the authority granted by both Section 11-35-1520(7) of the South Carolina Consolidated Procurement Code (Code) and the South Carolina Budget and Control Board (Board) Regulation 19-445.2085(C), this written determination follows.

Background

MMO issued an IFB on July 21, 2010 seeking to award statewide term contracts for toilet paper and paper towels. [Protest Hearing Exhibit 1] The IFB contained four attachments. [Protest Hearing Exhibits 2, 3, 4, 5] Following three amendments [Protest Hearing Exhibits 6, 7, 8], bids were ultimately opened on August 24, 2010. On September 3, 2010, MMO issued an Intent to Award, which awarded contracts as follows:

- Contract No. 4400002840 (Lot 1): Janpak Inc.
- Contract No. 4400002841 (Lot 2): Grainger Industrial Supply
- Contract No. 4400002842 (Lot 3): Southeastern Paper Group (Southeastern)
- Contract No. 4400002843 (Lot 4): Dade Paper and Bag Co.
- Contract No. 4400002844 (Lot 5): XPEDX

[Protest Hearing Exhibits 9]

Following the posting its Intent to Award, the CPO received protests from Southeastern, Ramayan Supply, Inc., and XPEDX. MMO suspended the intent to award on all the lots on September 13, 2010. [Protest Hearing Exhibit 10] In order to resolve the protests, the CPO conducted a hearing September 23, 2010. During the hearing, it was determined that two errors had been made in calculating the awards resulting from this solicitation. The CPO suspended the protest hearing in order to allow MMO time to revisit and recalculate the awards in accordance with the IFB.¹

MMO now requests the CPO cancel all awards resulting from this solicitation prior to performance due to the following two administrative errors: 1) not extending prices in determining the awards as specified in the IFB and 2) not awarding two contracts per lot as specified in the IFB.

Conclusions of Law

After a notice of intent to award but before performance, the Code permits the cancellation and re-award of awards or contracts in accordance with the regulations of the Board. Section 11-35-1520(7). Regulation 19-445.2085(C) provides, in relevant part:

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, **the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled**, if the Chief Procurement Officer determines in writing that:...

(7) Administrative error of the purchasing agency discovered prior to performance... [Emphasis added]

The South Carolina Procurement Review Panel (Panel) has expressly recognized the CPO's right to exercise his authority under Regulation 19-445.2085(C). See Protest of Speciality

¹ The protest letters will be addressed in a separate Decision.

Underwriters and Appeal of Keenan & Suggs, Case No. 2004-2; Protest of B&D Marine and Industrial Boilers, Inc., Appeal by C&C Boiler Sales & Services, Inc., Case No. 2000-12; Protest of Analytical Automation Specialists, Inc., Case No. 1999-1; and Protest of Blue Cross Blue Shield of South Carolina and Public Consulting Group, Inc., Case No. 1996-3. In all those cases, the Panel found that cancellation and resolicitation was appropriate.

Here I find that MMO made two clear administrative errors in this procurement. Further, I find that a remedy pursuant to Regulation 19-445.2085(C)(7) is necessary. Based on the circumstances detailed below, cancellation and re-award, rather than resolicitation, is the appropriate remedy.

First, MMO announced in the IFB to all bidders that it would total all extended prices within a lot in order to determine the awards for each lot. Specifically, Part VI, Award Criteria, Calculating the Low Bid, page 13 of the original IFB reads:

The weighted percent was determined based on the total number of cases divided by the number of cases.

The weighted percent and the “case price vendor input” equals the weighted price per case.

The sum of weighted case price will be divided by the # of square feet per case.

If the recycled preference is claimed on the Bid Schedule, the preference will be applied after bid opening.

The total of all extended prices within a lot will be sum totaled.

However, it is undisputed that MMO did not extend the prices of the line items in each lot and total them when determining the awards. Based on MMO’s recalculation of the bids in compliance with the criteria in the IFB, this will result in different award recipients in some of the lots. [Protest Hearing Exhibit 11; See also Bid Re-Calculations.]

Second, MMO announced to all bidders that it would issue two awards per lot to the lowest responsive and responsible bidders. Specifically, Part I, Scope of Solicitation, on page 3 of the IFB

reads in part, "An award will be issued to the two lowest responsive and responsible bidders." However, it is undisputed that MMO inadvertently awarded only one award per each of the lots, which was contrary to the IFB.

Therefore, I find that two administrative errors occurred in MMO's evaluation and calculation of the awards in this matter. Accordingly, MMO is directed to cancel all the awards resulting from this solicitation in their entirety then recalculate and re-award all the lots in accordance with the Code and Regulations.²



October 19, 2010

Columbia, SC

² Once the revised Intent to Award is posted, any party meeting the requirements of Section 11-35-4210(1)(b) will have an opportunity to protest the reaward(s).

STATEMENT OF RIGHT TO ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

Copies of the Panel's decisions and additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Requests must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2010-2011, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an action before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

STATE OF SOUTH CAROLINA
State Budget and Control Board
PROCUREMENT SERVICES DIVISION

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R. VOIGHT SHEALY
MATERIALS MANAGEMENT OFFICER

TO: R. Voight Shealy, Chief Procurement Officer
Materials Management Office

FROM: John R. Stevens, CPPB, CPM, State Procurement Officer

DATE: October 14, 2010

RE: **5400002037** – Statewide Term Contract - Toilet Paper and Paper Towels

The above referenced contract award(s) should be canceled prior to performance in accordance with SC Regulation 19-445.2085, C, Cancellation of Award Prior to Performance, (7), which reads in part:

C. Cancellation Of Award Prior To Performance.

When it is determined after an award has been issued but before performance has begun that the State's requirements for the goods or services have changed or have not been met, the award or contract may be canceled and either re-awarded or a new solicitation issued, if the Chief Procurement Officer determines in writing that:

(7) Administrative error of the procuring agency discovered prior to performance

The referenced matter came before the Chief Procurement Officer in Case Numbers 2010-128, 129 and 130.

Solicitation No. 5400002037, broken into five (5) separate Lots, was intended to result in awards to the two (2) lowest responsive and responsible bidders for each lot. However, the State made only one award for each lot. Intents to Award were posted as follows:

Lot 1 – JanPak
Lot 2 – Grainger
Lot 3 – Southeastern Paper
Lot 4 – Dade Paper
Lot 5 - Xpedx

Part I, Scope of Solicitation, found on page 3 of the original IFB reads in part,

An award will be issued to the two lowest responsive and responsible bidders.

Further, Part VI, Award Criteria, found on page 13 of the original IFB reads,

AWARD CRITERIA – BIDS (Jan 2006)

Award will be made to the lowest responsive and responsive bidder(s).

AWARD BY LOT (JAN 2006)

Award will be made by complete lot(s).

In addition to making only one award, the state did not complete its work to extend the prices prior to determining the lowest responsive and responsible bidder(s) per lot.

Part VI, Award Criteria, found on page 13 of the original IFB reads,

CALCULATING THE LOW BID

The weighted percent was determined based on the total number of cases divided by the number of cases.

The weighted percent and the “case price vendor input” equals the weighted price per case.

The sum of weighted case price will be divided by the # of square feet per case.

If the recycled preference is claimed on the Bid Schedule, the preference will be applied after bid opening.

The total of all extended prices within a lot will be sum totaled.

The last step of the process (which I’ve highlighted in **bold** above) was not completed by the procurement officer. As a result, some vendors were awarded contracts in error.

The State Procurement Office respectfully requests that you approve our request to cancel the awards prior to performance. After extending the prices for each bidder in each lot and re-tabulating bids, we will then determine the apparent low responsive and responsible bidders for each lot and issue new awards, as may be appropriate.